(2)

No. 04-350

DEC 15 2004

In the Supreme Court of the United States

FLUOR DANIEL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the determination of the National Labor Relations Board that petitioner violated the National Labor Relations Act by refusing to hire union-affiliated applicants based on antiunion animus.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 332 F.3d 961. The decision and order of the National Labor Relations Board (Pet. App. 26a-80a) and the decision of the administrative law judge (Pet. App. 81a-122a) are reported at 333 N.L.R.B. 427.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2003. A petition for rehearing was denied on June 10, 2004 (Pet. App. 123a). The petition for a writ of certiorari was filed on September 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3), makes it an unfair labor practice to "discriminat[e] in regard to hire" to "discourage membership in any labor organization." Section 8(a)(3)'s protection of employees against "discrimination in regard to hire" extends to applicants for employment. See *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 185-186 (1941). In determining whether the refusal of an employer to hire an applicant is unlawfully motivated, the National Labor Relations Board (Board) for many years applied the same causation test it applies to assess the legality of a discharge. That test for discharges, known as the *Wright Line* test (see *Wright Line*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)), was approved by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983).

Several courts of appeals questioned the Board's use of *Wright Line* in the refusal-to-hire context.[1] In response to those concerns, the Board, in *FES (A Division of Thermo Power)*, 331 N.L.R.B. 9 (2000), enforced, 301 F.3d 83 (3d Cir. 2002), refined the *Wright Line* test to take account of differences between refusal-to-hire cases and discharge cases. The Board explained that, unlike in a discharge case which concerns the reasons that an alleged discriminatee was removed from the employer's work force, the issue in a refusal-to-hire case—*viz.*, why the applicant was not hired into the

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[1] See *NLRB* v. *Fluor Daniel, Inc.*, 161 F.3d 953, 966-967 (6th Cir. 1998); *Starcon, Inc.* v. *NLRB*, 176 F.3d 948 (7th Cir. 1999); *Ultrasystems W. Constructors, Inc.* v. *NLRB*, 18 F.3d 251 (4th Cir. 1994).

work force—presupposes that there were appropriate employment openings available to the applicant. Accordingly, the Board held that in refusal-to-hire cases the General Counsel must establish:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants.

Id. at 12. The Board further explained that, once those elements are established, "the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union * * * affiliation." *Ibid.*

2. Petitioner is a large, general construction contractor. Pet. App. 29a, 81a. Petitioner is the nonunion subsidiary of Fluor Corporation, a holding company that also has a union subsidiary, Fluor Constructors. *Id.* at 3a, 31a, 83a-84a. When staffing projects, petitioner typically applies its hiring priority policy. *Id.* at 3a, 32a, 85a. Under that policy, petitioner gives first preference to its previous employees, who have been certified through petitioner's in-house craft certification program. *Ibid.* Petitioner then looks to hire applicants with previous "Fluor Daniel" experience only. *Id.* at 4a, 85a. Lastly, petitioner reviews all other applicants. *Ibid.* Petitioner has excluded unionized labor from its hiring preference because, in its view, union employees

would be loyal to the union rather than to petitioner. *Id.* at 31a-32a, 111a.

In 1993, petitioner won bids for two contracting projects: one to take over maintenance of the nuclear power plant at the Palo Verde Nuclear Generating Station in Arizona; and the other to rebuild a coker plant destroyed by fire at an Exxon refinery in Louisiana. Pet. App. 3a, 33a, 86a-87a, 103a. Once petitioner had secured the Palo Verde and Exxon projects, area trade unions decided to allow members to apply for work at those jobs as "voluntary union organizers" (VUOs). *Id.* at 5a, 36a, 89a. VUOs agreed to accept employment if offered, to stay until laid off, and to avoid engaging in aggression or sabotage. *Id.* at 5a, 36a.

a. *Palo Verde.* The Palo Verde Nuclear Generating Station, the largest nuclear power facility in the United States, was built by Bechtel Corporation (Bechtel), a union contractor. Until petitioner's successful bid, Bechtel maintained the power plant under contract with the Arizona Public Service Corporation (APS). Bechtel-Palo Verde employees underwent extensive background checks and were assigned security clearances. Pet. App. 3a, 4a, 33a, 87a-88a.

Before bidding on the Palo Verde job, petitioner performed a wage survey of the Phoenix area. Pet. App. 33a. The survey report concluded that petitioner would need to look in other parts of the country to find "open shop" metal craft employees with nuclear experience, because hiring locally in those crafts presented petitioner's "greatest risk" of employing union workers. *Id.* at 33a-34a. Petitioner's bid to APS stated that it had "determined that an open shop labor posture can best meet our goals," and stressed that it had successfully made the transition from union shop to open shop many times. *Id.* at 4a, 5a, 34a. The proposal assured APS

that "open shop" meant that employees would be loyal to APS and petitioner rather than to a union, and emphasized that petitioner had a national network of nonunion craft workers from which to recruit and fill positions. *Id.* at 34a.

Palo Verde staffing commenced in June 1994; and by February 1996, petitioner had hired 962 craft employees from the 1261 employees who applied for work. Pet. App. 5a, 35a, 56a. Petitioner relied on telephone and mailgram recruiting of former nonunion employees, including many living outside Arizona. *Id.* at 5a. Petitioner also recruited heavily from other sources, including individuals who had never worked for petitioner or for any other nuclear facility. *Id.* at 52a. Although petitioner had represented in its bid proposal that it would canvass the incumbent, experienced Bechtel employees for nuclear workers with acceptable skills, petitioner did not make an effort to recruit from the unionized Bechtel workforce. *Id.* at 34a, 52a.

Between June 16 and June 27, 1994, 77 VUOs and one paid union organizer applied for positions with petitioner at Palo Verde. Pet. App. 50a & nn.40-41, 88a-89a. All of the VUOs were former Bechtel employees with nuclear and hazardous work experience, and all had worked at Palo Verde for many years in the same jobs for which they were applying; some were even applying for the job they were then performing. *Id.* at 50a & nn.40 & 42, 51a, 88a. All had worked inside the reactor containment performing hazardous work that required superior training and skill. *Id.* at 50a-51a. None of those applicants was hired. *Id.* at 50a.[2]

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[2] The first group of VUOs applied on June 16 for boilermaker positions. All other applicants applied for comparable work bearing different job titles, such as "ironworker," "millwright," and

Petitioner did hire some VUO candidates at Palo Verde when it had no knowledge of their union affiliation. Pet. 18 n.3. In mid-August, Mark Smith and Steve Horlacher applied for employment as boilermakers without wearing union insignia, and both were hired. Pet. App. 53a, 90a, 100a. Petitioner told Smith and Horlacher that petitioner needed welders with nuclear experience. *Id.* at 53a, 100a, 103a. Horlacher advised petitioner that the Union could supply experienced welders and gave petitioner the union organizer's card, but petitioner never contacted the organizer. *Id.* at 53a n.47. On July 27, 1994, petitioner hired welder Danny Garnica when he was not wearing his union insignia and had not identified himself as union-affiliated. *Id.* at 95a-96a.

In sum, of the 111 employees hired for petitioner's base crew at Palo Verde, approximately one-third had no prior nuclear experience. Pet. App. 52a. Of the total craft employees hired, more than one-quarter were off-the-street applicants, normally accorded the lowest hiring priority under petitioner's policy. *Id.* at 56a. Of the 200 former Bechtel employees who submitted

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"pipefitter." Pet. App. 52a & n.46. Petitioner allowed several of the VUOs to apply for the position of "boilermaker," then placed those applications into a dead file designated for nonbudgeted positions. *Id.* at 53a. On June 27, an additional 26 VUOs tried to apply for employment but petitioner refused to accept their applications and did not tell them to check back for possible openings. *Id.* at 53a-54a, 88a. Petitioner's recruiter, a millwright, also informed the VUOs that no vacancies were expected in his craft in the next 60 days. *Id.* at 54a. During the subsequent 60-day period, petitioner accepted additional non-VUO applications. After June 27, petitioner hired 68 nonunion applicants. It also told other nonunion applicants to check back in case of no-shows. *Ibid.* Many of the post-June 27 hires had no prior nuclear experience; some of the non-preferenced applicants had no relevant experience. *Id.* at 55a.

applications, petitioner hired 91—none of whom was a VUO or presented indicia of union activity beyond his presumed union membership by virtue of his past employment with Bechtel. *Id.* at 52a, 56a. Finally, petitioner's business reports revealed as many as 892 known deviations from its hiring rules, with significant numbers of applications containing more than one deviation and with no deviation inuring to the benefit of a single VUO. *Id.* at 56a-57a.

b. *Exxon.* Petitioner was awarded the Exxon contract in October 1993. Pet. App. 34a, 103a. In December 1993, an official of petitioner's industrial relations department issued a memorandum directing recruiters to reduce the period during which applications were considered active to 30 days, instead of the 60-day period normally adhered to by petitioner. *Id.* at 34a-35a, 113a. The purpose of the directive was to "protect ourselves from unfair labor practice charges" while "remaining nonunion on direct-hire jobs." *Id.* at 34a-35a & n.18, 108a, 111a.

Exxon staffing commenced in January 1994; and by December 1994, when the project ended, petitioner had hired nearly 2800 employees. Pet. App. 35a. Petitioner solicited applications from former employees by mailgram, contacted other jobsites that were closing, and maintained a telephone log of persons calling petitioner for work. *Id.* at 6a. Between late December 1993 and January 19, 1994, petitioner accepted nearly 700 applications in all crafts, regardless of whether there were openings in the craft or whether the applications were likely to be acted upon within 30 days. *Id.* at 6a, 37a.

Between January 25 and August 30, groups of VUOs submitted applications at the Exxon recruiting office on several occasions. Pet. App. 38a & n.23. All of those applicants were well qualified, most had 20 to 30 years

of experience in their trade, and most had completed a 48-month apprenticeship, which exceeded petitioner's 42-month qualification requirement. *Id.* at 38a & n.24, 43a, 44a-45a, 104a-106a. Recruiters did not tell the VUOs that their applications would be valid for only 30 days or that journeyman applications had to reflect 42 months of craft experience, although they routinely told other applicants to list 42 months. *Id.* at 38a-39a, 112a-113a. When VUOs called to follow up on their applications, recruiters failed to advise them that their applications were lacking the 42-month experience requirement, but recruiters did inform the applicants that their applications had expired because of the 30-day rule. *Id.* at 39a, 113a. Petitioner routinely made exceptions to its hiring rules in favor of other applicants. *Id.* at 40a. For example, petitioner hired former-employee applicants without 42 months of craft experience who had never submitted an application or whose application had expired under the 30-day rule. *Id.* at 41a-43a, 45a.

In August 1994, petitioner determined that it would improve its chances of avoiding issuance of a complaint by the Board's General Counsel if it could show that it hired some union-affiliated applicants. That month, petitioner hired two known union activists. Pet. App. 39a, 112a. Petitioner otherwise did not hire, interview, or contact any VUO applicant. *Id.* at 38a, 104a-106a, 111a-112a.

3. Acting in response to charges filed by the Unions,[3] the Board's General Counsel issued a con-

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[3] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; Plumbers and Steamfitters Local Union No. 198 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; Inter-

solidated complaint, alleging, *inter alia*, that petitioner violated Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1) and (3), by refusing to hire job applicants at its Palo Verde and Exxon construction sites because of their union affiliation. Pet. App. 7a, 81a-82a.

a. An administrative law judge (ALJ) sustained those allegations in pertinent part after holding 51 days of hearings. Pet. App. 81a-122a. The ALJ concluded that petitioner failed and refused to hire 79 job applicants at its Palo Verde project and 40 job applicants at its Exxon project because of the applicants' union affiliation. *Id.* at 7a, 86a, 90a-94a, 104a-107a, 122a.

With respect to Palo Verde, the ALJ found that the 78 VUOs who applied for or tried to apply for employment "possessed skills that were needed by [petitioner] and applied for jobs [for] which [petitioner] later hired literally hundreds of other applicants." Pet. App. 88a. The ALJ further found that the "record contains massive amounts of evidence which demonstrate anti-union animus," and that "these union affiliated applicants for employment were denied hire because of their union affiliation." *Id.* at 98a. The ALJ noted that petitioner preferred an open shop policy and that hiring union members threatened that policy because they "could conceivably seek union representation and ultimately, a collective bargaining agreement." *Ibid.* The ALJ also relied on the fact that petitioner hired no former Bechtel employees who self-identified as VUOs, but did hire former Bechtel employees when it was unaware of their VUO status. *Id.* at 99a-102a. In addition, the ALJ observed, petitioner expended considerable resources to avoid hiring the VUO Bechtel em-

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national Brotherhood of Electrical Workers, Local Union No. 995. Pet. App. 7a, 81a.

ployees, including paying a per diem to out-of-state craftsmen while ignoring VUOs who lived locally. *Id.* at 102a-103a.

With respect to Exxon, the ALJ found that all of the union-affiliated applicants were "highly qualified" in their craft. Pet. App. 104a-107a. The ALJ further found, based on the "massive evidence of antiunion animus," that "these applicants were denied hire because of their membership in the union." Pet. App. 107a-108a. Central to that conclusion was the memorandum clarifying petitioner's hiring preference for nonunion applicants and directing recruiters to reduce the period of time applications remained active from 60 days to 30 days. See *id.* at 108a-109a. The ALJ also observed that petitioner hired two union-affiliated applicants in an effort to avoid issuance of a complaint, *id.* at 112a-113a, and that the other qualified union-affiliated applicants were not hired despite petitioner's dire need for workers, *id.* at 114a-116a.

b. The Board affirmed the ALJ's findings and conclusions in pertinent part, Pet. App. 26a-80a, holding that petitioner "refused to consider and hire the discriminatees at Exxon and Palo Verde because of its unlawful antipathy to their union status," *id.* at 58a; see *id.* at 27a-28a. Applying the test for refusals-to-hire established in *FES*, 331 N.L.R.B. at 9, see pp. 1-2, *supra*, the Board determined: "[petitioner] was hiring throughout the period when discriminatee applicants applied or unsuccessfully sought to apply for employment at the Exxon and Palo Verde sites"; "those discriminatees were well qualified and experienced applicants for the positions they sought"; and "the record is replete with evidence that antiunion animus factored heavily in [petitioner's] decision not to hire the discriminatees." Pet. App. 59a.

With respect to Palo Verde, the Board found that "there were hundreds of jobs that needed to be filled," Pet. App. 66a n.84, and that petitioner manipulated its hiring policy to ignore "the obvious source of qualified workers, the incumbent work force, and recruited from elsewhere in the country to avoid the risk of hiring organized craft employees," *id.* at 62a & n.69. With respect to Exxon, the Board observed that petitioner experienced persistent difficulty staffing the project with pipefitters, pipe welders, and electricians, *id.* at 42a, and that petitioner "never contended that there was not enough work at the project to hire the discriminatees," *id.* at 66a n.84. Rather, the Board explained, petitioner "relied on its 30 day rule to claim that their applications were never open when [petitioner] was hiring in their crafts." *Ibid.*

The Board found "abundant record evidence that [petitioner] both harbored animus and acted upon it," and determined that petitioner "engaged in a pattern of systematic discrimination intended to screen out union activists from consideration for employment." Pet. App. 60a. The Board explained:

> Hiring practices at both projects abounded with one-sided exceptions and disparities. Discriminatees were given different information and different opportunities to apply from applicants who had no discernable union activist leanings. The discriminatees were kept uninformed concerning vital hiring rules and threshold employment requirements, yet were held to the strictest standards of compliance. Although they submitted credentials that would have warranted inquiry * * * no discriminatee was interviewed or spoken to beyond perfunctory, and sometimes untruthful, statements. At the same

> time, applicants with weak or nonexistent union ties were courted, accommodated, and hired, even when they did not meet the [petitioner's] employment criteria. * * * [Petitioner] offered "no credible reasons" for these clear disparities. We * * * conclude * * * that [petitioner's] defenses are pretextual.

Id. at 63a-65a (footnotes omitted). In addition to relying on most of the ALJ's findings of antiunion animus (*id.* at 59a-60a & n.58), the Board observed that high-ranking corporate officers harbored the view that union organizers could not be loyal employees (*id.* at 60a-61a), and that corporate managers at both sites admitted petitioner's discriminatory intent (*id.* at 61a-62a).

Finally, the Board rejected petitioner's argument, based on the Sixth Circuit's decision in *NLRB* v. *Fluor Daniel*, 161 F.3d 953 (1998) (*Fluor Daniel II*), that the General Counsel failed to establish a violation of the NLRA "by failing to match each alleged discriminatee with an available job that he or she was qualified to perform." Pet. App. 66a. The Board explained that, here, unlike in *Fluor Daniel II*, the ALJ "expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and further, that over the life of both projects there were enough positions to have employed every discriminatee." *Ibid.* The Board observed that petitioner did not contend that "there was insufficient work to employ the discriminatees," but instead relied "on the defenses that we have found to be pretextual to explain its failure to hire them." *Ibid.*

The Board, in relevant part, ordered petitioner to "[c]ease and desist from * * * [d]iscouraging employees from engaging in activities on behalf of a labor

organization by refusing to * * * hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers." Pet. App. 69a.

4. Petitioner filed a petition for review in the court of appeals, and the Board filed a cross-application for enforcement of its order. The court of appeals denied the petition for review and enforced the Board's order in pertinent part. Pet. App. 1a-25a.

The court of appeals stated that, in refusal-to-hire cases, the General Counsel must show antiunion animus and a covered action such as "a particular failure to hire," an analysis that "requires the General Counsel to 'match[] up applicants with available jobs for which they are qualified.'" Pet. App. 10a. That requirement, the court explained, means that applicants "must be actually qualified for the respective job positions and that the job positions must be actually available." *Ibid.* The court held that the Board's approach in *FES* "fully addressed our concerns and set out a framework wholly consistent with our holding in *Fluor Daniel II*." *Id.* at 11a.

The court found that, in this case, the Board engaged in "precisely the type of detailed analysis required under our decision in *Fluor Daniel II*, as incorporated by the NLRB in *FES*." Pet. App. 13a. "With respect to the specific issue of job matching," the court explained, "the NLRB adopted the findings of the ALJ that Fluor Daniel was hiring during the time that the discriminatees applied and that the discriminatees were qualified." *Id.* at 12a. The court observed that the ALJ "undertook a detailed analysis of the discrimination at each of the work sites, noting names of applicants, the dates that they applied for positions or attempted to apply for

positions, the number of applicants actually hired by [petitioner], and the positions that were filled by [petitioner]." *Ibid.* The court agreed with the Board that, "[i]n contrast to *Fluor Daniel II*," the ALJ "expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over the life of both projects there were enough positions to have employed every discriminatee." *Id.* at 12a (quoting Pet. App. 66a). The court thus held that the Board's findings and conclusions were supported by substantial evidence. *Id.* at 13a-14a.

Finally, the court rejected petitioner's argument that the Board failed to take into account petitioner's hiring rules—in particular, petitioner's hiring preference system and its 60-day rule. Pet. App. 14a. The court concluded that substantial evidence supported the Board's finding that petitioner "unlawfully applied its system of hiring preferences, policies, and procedures so as to refuse to consider or hire 120 voluntary union organizers." *Ibid.* (internal quotation marks omitted).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore unwarranted.

1. Contrary to petitioner's claim (Pet. 11-12), the decision of the court of appeals does not conflict with this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983). In *Transportation Management*, this Court upheld, as a permissible construction of the NLRA, the Board's *Wright Line* burden-shifting approach in cases involving discharges and other adverse employment actions alleg-

edly motivated by union activity. Under that approach, the Board's General Counsel must first show that union activity was a motivating factor in an employer's decision to "discharge or [engage in] other adverse action" against a statutory employee. *Id.* at 401. Once that is established, the employer can avoid liability by demonstrating as an affirmative defense that it would have made the same decision in the absence of any protected activity. *Id.* at 401-402; see *Director, Office of Workers' Comp. Programs* v. *Greenwich Collieries*, 512 U.S. 267, 278 (1994) (reaffirming Board's approach as consistent with Administrative Procedure Act, 5 U.S.C. 556(d)).

The Board's *FES* test for refusals-to-hire, which it applied here and which the Sixth Circuit upheld, fully comports with the analysis in *Transportation Management*. The *FES* test requires the General Counsel to prove that antiunion considerations were a motivating factor in the employer's refusal to hire union-affiliated employees, by showing that jobs were available, that applicants were qualified, and that union animus contributed to the refusal to hire. If the General Counsel meets that burden, the burden shifts to the employer to establish that the applicants would not have been hired even absent their union affiliation.

The court of appeals determined that the General Counsel fully met his burden under *Transportation Management* of proving that antiunion sentiment contributed to petitioner's hiring decisions. The court pointed to the Board's "detailed analysis of the discrimination at each of the work sites," including its examination of evidence concerning all applications, the number of positions filled and applicants actually hired, and the qualifications of the union applicants, which supported the conclusion that "vacancies existed that the discriminatees were qualified to fill, and further,

that over the life of both projects there were enough positions to have employed every discriminatee." Pet. App. 12a-13a (quoting Pet. App. 66a). The court also discussed the Board's analysis of evidence showing petitioner's extraordinary efforts to avoid hiring available union applicants, and determined that substantial evidence supported the Board's finding of numerous deviations from petitioner's hiring policies. *Id.* at 13a, 14a-17a, 21a-23a.

Finally, the court concluded that substantial evidence supported the Board's findings that petitioner not only harbored animus against union-affiliated applicants, but also used its hiring policies as a pretext for discriminating against the union applicants. Pet. App. 14a-17a, 20a. In those circumstances, petitioner errs in asserting (Pet. 11-12, 14) that the court of appeals and the Board "eased the burden on the General Counsel to showing nothing more than anti-union animus." Both the court of appeals and the Board found that petitioner had in fact adopted a policy of discrimination with respect to hiring decisions.

Petitioner argues (Pet. 11) that the court of appeals' decision conflicts with *Transportation Management* because the court failed to require the General Counsel to "identify the specifically available job" for each applicant, "so that an initial determination [could] be made as to whether a hiring decision actually occurred and, if so, a proper comparison [could] be made to determine respective qualifications." *Transportation Management*, however, did not address the requisite level of specificity of evidence that antiunion animus caused injury to employees "in regard to hire." 29 U.S.C. 158(a)(3). And in any event, the court of appeals correctly read both its precedent and the Board's *FES* decision to "require that the General Counsel make

specific findings both that jobs were available at the time of the alleged discrimination and that [the] discriminatees were qualified for the jobs." Pet. App. 11a. In finding causation, the court of appeals held that the Board engaged in an appropriate analysis of job matching by finding that openings existed during the time that the discriminatees submitted, or attempted to submit applications, that the discriminatees were highly qualified to fill those job openings based on their resumes and experience, and that over the life of both projects there were sufficient positions in the relevant job categories to have employed every discriminatee. *Id.* at 9a, 12a-14a.[4]

Petitioner wrongly argues (Pet. 16) that the court of appeals and the Board determined job availability based solely on the number of positions petitioner filled over the course of the two projects. To the contrary, the court and the Board both relied on record evidence that petitioner filled positions in all crafts performed by the union applicants, and that, over the course of both the Exxon and Palo Verde jobs, petitioner had great difficulty filling those positions and went to substantial lengths to fill them with individuals other than the union applicants. Pet. App. 12a-17a, 37a-46a, 52a-57a. There also is no merit to petitioner's related argument (Pet. 17) that the Board failed to make the "critical finding * * * that the applicants had valid, *active* applications on file at the time of the need for these positions." The court of appeals upheld the Board's

[4] Petitioner asserts (Pet. 18) that the record fails to show the qualifications of eight applicants for positions at Palo Verde. The record, however, shows that like all other applicants for positions at Palo Verde, those eight applicants had previously worked at the Palo Verde plant for Bechtel, a showing that established their qualifications. Pet. App. 12a, 50a-51a.

finding that petitioner used its hiring policies, including its policies with respect to active applications, as a pretext for discriminating against the union applicants. Pet. App. 14a-17a, 61a, 62a-65a.

Contrary to petitioner's argument (Pet. 20), the language of the statute does not mandate a more individualized matching of jobs and applicants than was required by the court of appeals. The statute generally prohibits discrimination "in regard to hire." 29 U.S.C. 158(a)(3). That language plainly permits the Board's conclusion that such discrimination was established where the record demonstrated that all discriminatees were qualified for available positions, that petitioner filled enough positions to have employed every discriminatee, and that petitioner's refusal to hire those applicants was based on discriminatory animus.[5]

2. Contrary to petitioner's argument (Pet. 12-13), there is no conflict between the decision below and decisions of other courts of appeals.

Petitioner's claim (Pet. 12) that the court of appeals' decision conflicts with that court's own prior decision in *Fluor Daniel II* is misplaced. As an initial matter, the alleged intra-circuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the two decisions are not in conflict. The court's decision here (which reflects the views of two judges who also joined

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[5] For similar reasons, there is no merit to petitioner's claim (Pet. 20-21) that it was denied due process because the Board "impose[d] liability without the necessary finding of a statutory violation." The court of appeals correctly held that the causation requirement of Section 8(a)(3) was met, and that, under *Transportation Management*, petitioner had ample opportunity to "avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation." 462 U.S. at 401.

the decision in *Fluor Daniel II*) specifically concludes that "the NLRB in *FES* fully addressed our concerns and set out a framework wholly consistent with our holding in *Fluor Daniel II*." Pet. App. 11a. Moreover, the court held that the Board properly applied that framework here by engaging in a detailed analysis of the qualifications of applicants, the jobs that were open at both sites, and the time periods during which those openings were filled. *Id.* at 11a, 12a-14a.

There is no merit to petitioner's claim (Pet. 13) that the court of appeals' approach conflicts with *Starcon, Inc.* v. *NLRB*, 176 F.3d 948 (7th Cir. 1999), a pre-*FES* case. Although the Seventh Circuit in *Starcon* criticized aspects of the Board's pre-*FES* approach in refusal-to-hire cases, that court, like the Sixth Circuit here, has subsequently approved the Board's *FES* standard in refusal-to-hire cases. See *Masiongale Elec.-Mech., Inc.* v. *NLRB*, 323 F.3d 546, 552-555 (7th Cir. 2003).

There also is no conflict between the court of appeals' decision and *Ultrasystems Western Constructors, Inc.* v. *NLRB*, 18 F.3d 251 (4th Cir. 1994). See Pet. 12. In *Ultrasystems*, the ALJ had found that the employer had refused to *consider* certain union applicants; and the court of appeals held that the Board could not order the employer to *hire* those applicants unless "the refusal to consider also results in an actual refusal to hire." 18 F.3d at 259. That issue is distinct from the issue in this case concerning whether the Board reasonably concluded that petitioner unlawfully refused to hire known union affiliated applicants. See Pet. App. 58a (finding that petitioner "refused to consider *and hire* the discriminatees at Exxon and Palo Verde because of its unlawful antipathy to their union status") (emphasis added); *id.* at 98a (ALJ finding that "union

affiliated applicants for employment [at Palo Verde] were *denied hire* because of their union affiliation") (emphasis added); *id.* at 107a-108a (ALJ concluding that union-affiliated applicants at Exxon "were *denied hire* because of their membership in the union") (emphasis added). See also *FES*, 331 N.L.R.B. at 12, 15 (distinguishing refusal-to-hire and refusal-to-consider contexts).

Finally, petitioner's claim of a conflict among the courts of appeals is undermined by decisions since the Board's *FES* decision that either expressly uphold the *FES* framework or uphold the Board's application of that framework. See *NLRB* v. *Interstate Builders, Inc.*, 351 F.3d 1020, 1035-1037 (10th Cir. 2003); *Masiongale Elec.-Mech., Inc.* v. *NLRB*, 323 F.3d at 552-555 (7th Cir.); *Casino Ready Mix, Inc.* v. *NLRB*, 321 F.3d 1190, 1194-1199 (D.C. Cir. 2003). See also *Wolfe Elec. Co.*, 336 N.L.R.B. 684, 690 (2001), enforced, 314 F.3d 325 (8th Cir. 2002); *Little Rock Elec. Contractors, Inc.*, 336 N.L.R.B. 146 (2001), enforced, 50 Fed. Appx. 570, 576 (4th Cir. 2002) (per curiam); *Moses Elec. Serv., Inc.*, 334 N.L.R.B. 567 (2001), enforced, No. 02-60016 (5th Cir. July 15, 2002) (per curiam) (unpublished). Cf. *NLRB* v. *Pneu Elec., Inc.*, 309 F.3d 843, 857-858 (5th Cir. 2002) (post-*FES* decision upholding Board's finding of unlawful refusal to consider union applicants under either *FES* or *Fluor Daniel II*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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